NO. 88-1154

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RONALD S. MONROE

Petitioner

Versus

HILTON BUTLER,
WARDEN, LOUISIANA STATE PENETENTIARY
ANGOLA, LOUISIANA

Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS STATE OF LOUISIANA

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REASONS FOR DENYING CERTIORARI

I. In a myriad of unsubstantiated assertions about there being "new pieces of evidence," petitioner, once again, for at least the *third* time, asks this Court to grant a Motion for New Trial where the state courts refuse to grant one. This Honorable Court's decisions make it clear that federal courts *are not* proper forums to decide New Trial Motions Based on Newly Discovered Evidence.

II. No competent evidence exists to show Monroe's level of intelligence, *or* lack thereof. Even accepting petitioner's unfounded allegation that he is a "borderline mental retard," this classification does not qualify him as a ***Penry*** type defendant, (***Penry v. Lynaugh***, citation below).

III. Absolutely no meaningful comparison can be made between the VIS evidence used in ***Booth v. Maryland***, (citation below) and the trial references to the victim's family in the instant case.

IV. Monroe's jury was repeatedly informed of its full responsibility in imposing the death penalty. The jury was repeatedly informed that *their* final decision would determine whether a life or death sentence would be imposed. The rule of ***Caldwell v. Mississippi***, (citation below) has no application here.

V. Monroe's jury was clearly, unequivocally and specifically told that their failure to unanimously agree on a death sentence would result in a life imprisonment term. Thus, there was absolutely no risk that the jury was misinformed or led to believe that they must

unanimously find a mitigating circumstance before a life sentence could be imposed. The rule of ***Mills v. Maryland***, (citation below) is similarly inapplicable here.

VI. The rule of ***Teague v. Lane***, (citation below) prohibits Monroe from raising the ***Penry***, ***Booth***, ***Caldwell*** and ***Mills*** claims in this petition for collateral review.

STATEMENT OF THE CASE

Proceedings Below Since Monroe's Last Appearance In This Court

After petitioner's application for writ of certiorari in this court was denied, a third execution date was set for August 25, 1988.

In concert with petitioner's strategy of delay, exaggeration, and obfuscation a thirty-three (33) page brief containing five new constitutional claims was filed in state trial court *three* days (August 22, 1988) before the scheduled execution. The petition was denied in the trial court. However, the Louisiana Supreme Court stayed the execution for the purpose of giving closer scrutiny to the "identification issue." On November 14, 1988 the stay was lifted (*See* "Order," Pet. Br., Appendix "B".) In a concurring opinion, Justice Lemmon reaffirmed the soundness of the conviction by describing the two eyewitness identifications of Monroe as being "rock solid."

Once the stay was lifted, a fourth warrant of execution was duly issued for December 14, 1988. After the November 14th order lifting the stay, petitioner failed *another* motion for stay. In stating grounds for a stay, petitioner misled the state court into believing that (1) the same ***Brady*** issue raised in petitioner's last appearance had not yet been before

this court, and, (2) time was needed to prepare a petition to this Court when, in fact, one had been prepared, filed, and served on respondent. The court granted *another* stay for the purpose of allowing this Court to review the identification issue.[1]

STATEMENT OF THE FACTS

In the early morning of September 10, 1977 Ronald Monroe entered the home of Lenora Collins and mercilessly slaughtered her in the presence of her two children, Theodise and Joseph. Monroe, a next door neighbor, also stabbed one of the children who tried to thwart the attack. Within minutes police arrived. The surviving children immediately pointed out Monroe as the murderer. No other competent evidence exists to controvert these established facts. Based on these "rock-solid" and unimpeachable identifications, Monroe was convicted and sentenced to death.

ARGUMENT

I. The Motion for a New Trial

Monroe's tiring, incessant claim that another person is responsible for this crime has been before this court on at least three prior occasions.[2] It has been exhaustively reviewed and examined by every court of appellate access. This

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1. The state sought reconsideration of the stay order by reminding the court that Petitioner did raise the issue in this court previously and filed a brief in this Court. The state's Motion to Reconsider was denied by a 5-3 margin. (See Exhibit "A").

2. *Monroe v. Butler*, _____ U.S. _____, 109 S.Ct. 7, 101 L.Ed. 958 (1988); *Monore v. Butler*, _____ U.S. _____, 108 S.Ct. 1582, 99 L. Ed. 897 (1988); *Monroe v. Blackburn*, 476 U.S. 1145, 106 S.Ct. 2261, 90 L.Ed.2d. 706 (1985).

matter is now *res judicata*. Respondent respectfully refuses, once again, to engage in more verbal jousting on an issue that has been repeatedly reviewed and decided in a manner Monroe simply will not accept, but must. When stripped to its essentials it is simply another disguised plea for a new trial due to alleged newly discovered evidence.

This case comes to the Court on a writ of certiorari to review the Louisiana Supreme Court's denial of a state post-conviction relief application. Louisiana's standard of appellate review for the denial of new trial motions is set forth in La. C. Cr. P. Art. 851. Petitioner takes issue with this standard and claims a different one should apply in capital cases. However, petitioner cannot show this Court how the standard is unconstitutional, or, how it was unconstitutionally applied in the courts below. This Court has long held that the proper forum for determining the merits of new trial motions based on newly discovered evidence for a state conviction is in *state* court, *not federal court*. ***Townsend v. Sain***, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), See e.g., ***Armstead v. Maggio***, 770 F.2d 894 (5th Cir. 1983). Petitioner presents no compelling reasons to amend this longstanding procedure.

II. The *Penry* Claim

Nearly twelve years after Monroe killed Lenora Collins, and one week before his August 25, 1988 execution date, it was suddenly discovered that Monroe is a "borderline retard." Monroe urges this Court to equate his case with the ***Penry v. Lynaugh***, 108 S.Ct. 1896 (1988), case currently pending the decision of the Court on whether it is constitutional to execute a mentally retarded person. Monroe claims he too should be declared ineligible for capital punishment.

Monroe's own classification distinguishes himself from the ***Penry*** defendant. The most Monore can claim about his mental condition is that he is a "borderline retard" (Pet. Br. p. 18). What distinguishes borderline retardation from chronic retardation is not made clear. What is clear is that nowhere in ***Penry's*** case is the qualifier "borderline" used. Additionally, in ***Penry***, the question of retardation arose in a contradictory courtroom setting where witnesses were subjected to the rigors of cross-examination and the adversarial process. Just like the "new pieces of evidence" discussed above, this evidence is presented to this Court in the most unreliable form of rank hearsay available. At no time has Monroe tried to admit competent evidence in a trial court to support his claim. Unlike ***Penry***, no evidence of alleged borderline mental retardation was offered during any pre-trial or post-trial hearings; no insanity defense was ever raised. Monroe's mental capacity has never before been an issue in this case until after this court granted ***Penry's*** writ application.

Respondent submits that even if Monroe could prove he is a "borderline retard," his particular condition does not qualify him for consideration; particularly when the evidence submitted to support this classification is incompetent, and, particularly when the most that the submitted evidence shows is that the petitioner has difficulty "sorting through the more complex social demands of living without external support," (See Pet's. Br. p. 18.) Not a soul on earth can claim that he/she does not have the same difficulty on any given day of the week.

III. The *Booth* Claim

Monroe complains that several references during trial concerning the impact of the crime on family members violated the rule set down in ***Booth v. Maryland***, 479 U.S. 882, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

In ***Booth***, this Court held that a Maryland statute requiring the introduction of a "Victim Impact Statement" ("VIS") at the sentencing phase of a capital murder trial violated the eighth amendment. The information in the VIS at issue in ***Booth***, which could either be read to the jury or testified to by family members, described in pronounced detail the personal characteristics of the victims, the emotional impact of the crime on the family, and the family members' opinions and characterizations of the crime and the defendant. After analyzing the many dangers inherent in allowing such information before the jury, this Court "reject[ed] the contention that the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics, are proper sentencing considerations in a capital case." ***Booth***, 107 S.Ct. at 2535.

The Court was careful to stress that its disapproval of victim impact information at the sentencing phase of a capital trial does not mean that information about the impact of the crime on the family and victim's personal characteristics will never be relevant in any context. ***Booth***, 107 S.Ct. at 2535 N.10. "Similar types of information may well be admissible because they relate directly to the circumstances of the crime," Id.

Petitioner complains that the trial testimony *and* the prosecutor's closing argument in the sentencing phase was "precisely the same type" forbidden by ***Booth***.

Review of the trial record exposes another example of petitioner's prowess at gross exaggeration. The cited passages of so-called inflammatory trial testimony indicate oblique, brief and cryptic references to the victim's family. Even a cursory comparison of the VIS permitted before the jury in ***Booth*** and the references to the Collins family in the instant case reveal a wealth of difference in the scope, tone and effect of the information provided in ***Booth***.

Booth footnote ten (10) is particularly revealing in the instant case. Note that *all* of the victim's immediate family were *fact* witnesses for the state during trial. The victim's children eyewitnessed the murder. The victim's mother established the motive. The victim's sister originally called the police. All of the complained of trial testimony related to circumstances of the case.[3]

During the state's closing argument in the sentencing phase, Monroe's trial counsel presented three witnesses; a social worker, a priest, and a sociology professor. All three witnesses admitted their prejudice against the imposition of the death penalty in any case. Their entire testimony was a blatant attempt to obtain sympathy for Monroe's underprivileged condition. In response, the state reminded the jury that for all they had just heard about Ronald Monroe's deprived background, *no evidence* was heard about the Collins' family and the impact of the event on the victim's children who eyewitnessed this murder.[4]

One need only peruse the VIS appended to the ***Booth*** decision to appreciate the qualitative difference in both length and detail of the evidence presented in that case and its impact upon a jury. The same risk of inflaming the jury and diverting it from its responsibility simply did not exist in this case.

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3. For example, in *Byrne v. Butler*, 845 F.2d 501 (5th Cir. 1988) the Fifth Circuit recognized that not all incidental references to victim's family's reaction to the crime is *Booth* material, particularly when references are elicited by fact witnesses.

4. It is interesting to note that even Monroe's trial counsel thought that the jury should not overlook the impact of the murder on the Collins family, ". . . and I am not trying to say that the family of the victim has not suffered or in any way say that should be overlooked," (Tr.T. 252).

IV. The *Caldwell* Claim

Petitioner also maintains that in closing argument at the punishment stage the prosecutor violated the rule of ***Caldwell v. Mississippi***, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

In ***Caldwell***, this court speaking through Justice Marshall, whose consistent view has long been that capital punishment is forbidden by the Constitution in any case, declared a death sentence unenforceable because it was imposed by a jury that had been misled by the judge *and* prosecutor about its role in the sentencing procedure. Concluding that the prosecutor's comments rendered the sentencing proceeding fundamentally unfair, a divided court required resentencing.

The misleading comment made by the prosecutor to the jury in ***Caldwell*** was, "Your decision is not the final decision." In the instant case the prosecutor merely stated the rule of Louisiana law requiring the Supreme Court to review all death penalty cases.

Caldwell has been interpreted to be a rule of narrow application. Only comments misleading a jury as to its role in the capital sentencing process by inducing it to feel less responsible than it should for the sentencing decision are prohibited. ***Darden v. Wainwright***, 477 U.S. 168, 183-84 n. 15, 106 S.Ct. 2464, 2473 n. 15, 91 L.Ed.2d 144, 159 n. 15). See also, ***Parks v. Brown***, 860 F.2d 1545 (10th Cir. 1988), and, ***Sawyer v. Butler***, (848 F.2d 582, 5th Cir. 1988). The prosecution in this case merely stated to the jury that the Supreme Court reviews each death penalty case. This was a correct statement of the law, (See, La.C.Cr.P., Art. 905.9), just as defense counsel's statement concerning the availability of pardons from the Governor was a correct statement of law (Tr.T. 250). Nowhere did the prosecution

suggest in any manner whatsoever that the jury's decision was not the final decision, Cf. ***Wheat v. Thigpen***, 793 F.2d 621 (5th Cir. 1986) (death penalty vacated for prosecutor telling jury that their decision is not final). Nor did the prosecutor *mislead* the jury about its role in the sentencing procedure. In fact, the jury had been told at several trial junctures that execution could not be exacted without *their* permission, (Tr.T. 249, 252, 258).

Caldwell is inapplicable here because, as in ***Darden***, neither the prosecution nor the judge mislead the jury or misstated the law; nor did they mislead the jury into thinking it had a reduced role in the sentencing process.

V. The *Mill's* Claim

Monroe next complains that the trial court erred in instructing the jury that it must unanimously find mitigating circumstances before it might weigh them against aggravating circumstances in violation of this Court's recent rule set down in ***Mills v. Maryland***, _____ U.S. _____, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). The result of such an instruction, Monroe alleges, is that the sentencing phase of the trial became subject to the possibility of a completely arbitrary decision to impose death because one juror could prevent all other jurors from considering a particular mitigating circumstance.

In ***Mills***, this Court considered the propriety of a verdict form submitted to a jury in a Maryland state court and concluded that, "there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance."

Mills, 108 S.Ct. at 1870. In vacating the judgment which sustained the imposition of the death penalty, the court focused on the specific written instructions given in that particular case and the verdict forms given to the jury. The court stated that the critical question was whether a reasonable jury (or reasonable juror) could have understood the instructions to mean that *all* 12 jurors had to unanimously find a mitigating circumstance before it could be considered.

In brief, petitioner selectively presents to this Court only a portion of what the jury was instructed. When the entire picture is framed, however, this claim is clearly exposed for its meritlessness. Note the following instructions given to Monroe's jury which were conveniently omitted from petitioner's brief:

> BY THE JUDGE:
>
> (After the sentencing hearing, but before deliberations)
>
> "Before you decide the sentence of death should be imposed you must unanimously agree (sic) find beyond a reasonable doubt that at least one statutory aggravating circumstance exists. If you find beyond a reasonable doubt that any of the statutory aggravating circumstances existed, you may consider it in imposing a sentence of death. **If, however, you do not unanimously find beyond a reasonable doubt that any one of the statutory aggravating circumstances existed, then, life imprisonment without benefit of probation, parole or suspension of sentence is the only sentence which may be imposed.** Even

if you find the existence of an aggravating circumstance, you must also consider any mitigating circumstances before you decide that a sentence of death should be imposed. The law specifically provides certain mitigating circumstances. These are as follows:" Tr.T. 258-59.

(The court recites statutory mitigating circumstances,) Tr.Tr. 260.

"I am going to ask the clerk to hand to the jury two blanks forms of verdicts . . . No listing of aggravating or mitigating circumstances is required." T.Tr. 261-62.

(The jury is ordered to deliberate shortly thereafter.)

Of crucial importance in this case is what transpired when the jury returned for more instructions.

BACK IN OPEN COURT:

BY THE COURT:

Who's the Foreman?

(The Court asks the foreman what further instructions might be helpful and a motion to declare a hung jury is denied.)

BY THE FOREMAN:

We are divided right now in our decision making. From the

evidence of discussion upstairs, I don't believe from the discussion we had that we are going to be able to get off dead center, because each one of us feel strongly about our particular posture right now. With that in mind, I felt like I had to ask you how we should approach the problem.

BY THE COURT:

Well, the law is this. As I understand it, and for present purposes, I am the law. As I understand it to render a verdict of death penalty, the penalty of death, the jury must agree unanimously. **However, if the jury cannot agree, then the court must impose a sentence of life imprisonment without the benefit of probation, parole or suspension of sentence. Is that clear to all of of you?**
(Jurors respond affirmatively.)

(The court then informs the jury that they should return to deliberate a while longer.)

Note the several clear and distinct instructions given to Monroe's jury contrasted to those given in ***Mills***.

Monroe's jury was told that failure to unanimously agree on finding aggravating or mitigating circumstances would result in life imprisonment; i.e., a hung jury equals life imprisonment. All of the jurors were expressly informed in plain and simple language that if even one juror believed that the death penalty should not be imposed, Ronald Monroe would not be sentenced to death.

Thus, there was nothing arbitrary in the jury's verdict.

VI. *Teague* Precludes Review of Three Claims

Respondent respectfully represents that this Court's recent decision in ***Teague v. Lane***, 109 S.Ct. 1060, (1989), precludes review of petitioner's ***Mills***, ***Booth***, and ***Caldwell*** claims.

In a detailed, extensive analysis of the historical development of retroactivity decisions, this Court ultimately decided to reject the rule of ***Linkletter v. Walker***, 381 U.S. 618, 636, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965), and adopted an approach favored by former Justice Harlan first discussed in his dissent in ***Desist v. United States***, 394 U.S. 244, 256-57, 89 S.Ct. 1030, 1037-38, 22 L.Ed.2d 248 (1969). The Harlan rule prohibits federal collateral review of state convictions on constitutional rules or criminal procedure which arise after direct review of the state conviction is final except if two very narrow circumstances are present.

Petitioner's direct review in the Louisiana Supreme Court became final May 19, 1981, (***State v. Monroe***, 397 So.2d 1258). Three of the instant claims arose in the decisions of this Court rendered after May 19, 1981. Neither of the two exceptions noted in ***Teague*** are present in this case.

Thus, under this new retroactivity rule petitioner may not avail himself to the new procedural rules of ***Mills***, ***Caldwell*** or ***Booth***.

CONCLUSION

Petitioner presents no compelling reasons why the Court should grant this writ application. The instant petition is Monroe's latest of a long history of successes in delaying his execution by sensationalizing claims unfounded by the record evidence.

This application should be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, BRIAN T. TREACY HEREBY CERTIFY to the Court that copies of this Reply have been duly served upon counsel for petitioner at the address below per first class mail, postage prepaid on May 4th, 1989.

Forty copies have been filed with the United States Supreme Court by U.S. mail, postage prepaid on May 4th, 1989.

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APPENDIX

APPENDIX A

THE SUPREME COURT
OF THE STATE OF LOUISIANA

NO. 88-KD-2654

STATE EX REL RONALD MONROE

VS.

HILTON BUTLER, WARDEN

In Re: State of Louisiana applying for Reconsideration of granting of Stay of Execution from Criminal District Court Parish of Orleans Div. F. No. 261-647.

December 13, 1988

Denied.

JAD
PFC
JLD
HTL

MARCUS, WATSON & COLE, JJ., would grant the writ.

Supreme Court of Louisiana
December 13, 1988

s/s Frank J. Johnson, Jr.
Clerk of Court
For the Court

1988 DEC 14 PM 12:21
(stamp)